No. 12261.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

COMPANIA ENGRAW COMMERCIAL E INDUSTRIAL, S. A., a corporation,

Appellant,

vs.

SCHENLEY DISTILLERS CORPORATION, a corporation,

Appellee.

ANSWER TO OPENING BRIEF OF APPELLEE.

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ANSWER TO OPENING BRIEF OF APPELLEE.

Introduction.

The clear statement of the pleadings and facts, as given in appellant's opening brief, disclosed the jurisdiction of the District Court and of the Court of Appeals. The specification of errors showed the erroneous views taken in the findings. A concise statement of the case and of the questions involved was simply stated. Upon this answer to the brief of appellee or defendant, as it desires to be called, reference is respectfully made to appellant's opening brief. Various inaccuracies contained in the brief of our opponent do not permit acceptance of its statements.

This brief, in answer to appellee's opening brief, naturally divides itself into four main heads, which, in themselves, comprise the argument of appellee. Con-

fusion, evident in appellee's brief, requires for orderly answer, a rearrangement and segregation into these four heads. Presentation of the "questions involved" in the brief of appellee clarifies the issues. A concise statement of these questions, when given in a proper and orderly approach, develop appellee's confusion.

I. May a written sales contract expressly made between two known principals be varied by argument or evidence so as to substitute instead of the principal therein designated as vendor the name of its agent expressly as such acting for said principal?

II. Is the meeting of the minds, essential to the formation of a sales contract, that which exists between the two duly authorized agents for the respective corporate principals, each of whom is acting within the scope of the respective authorities, or may reference be made to the state of mind of some other corporate agent not directly engaged in the negotiation?

III. When the original contract contains all of the terms agreed upon and no future negotiations are contemplated, does the mere fact that a subsequent formal document is later to be prepared by one of the parties affect the terms of the original contract?

IV. Does the burden of proof to establish illegality of a contract rest upon the party alleging that affirmative issue or is the party suing upon the contract required to establish the negative issue that there was no illegality?

The answer to appellee will, therefore, be made under the preceding four headings.

I.

The Sales Contract Was Written. By Its Terms, It Was Expressly Made Between Appellant as Vendor and Appellee as Vendee. By Its Terms, It Was Expressly Made by the Respective Agents of the Parties Thereto, Expressly Acting as Such Agents. The Terms of This Written Contract May Not Be Varied by Parol Argument or Evidence.

The parties to a contract are of primary consideration in any construction of its terms. This heading is logically placed first in order. It deals with the suggestion that Mr. Whipple, rather than appellant, was the principal in the contract, which appears in the brief of appellee extending from page 24 to page 36. Necessarily portions of the evidence and views thereon extending from page 24 to page 36 are affected by the argument and citations under this heading in so far as the terms of the contract are concerned.

A. Reexamination of the Facts Anent the Respective Agents Through Whom the Parties Acted Is First Required.

1. *The Agency of J. B. Donnelly, for appellee.*

The prime defense of appellee in actions such as this apparently is lack of authority of its agents. This lack of authority was pleaded in its answer [R. 50]. The screen of privilege of counsel, by other agents, was noted in appellant's opening brief. Pressure under the discovery rules resulted in the stipulation as to the full authority of Mr. Donnelly [R. 126; Ex. 6] to negotiate and enter into, on behalf of appellee, the contract in the case at bar and to make and consummate said contract.

2. *The Agency of Harold A. Whipple, for appellant.*

For upwards of twenty years, Mr. Whipple had operated in Los Angeles as an import and export broker [R. 105]. He had known appellant since 1945. Commencing with a personal interview between Messrs. Berger and Whipple in 1945, the two had looked forward [R. 222] to the development of a relationship dealing with an import and export trade to and from Argentina and the United States. The operation was intended to be flexible, in accordance with situations as they arose. According to Mr. Whipple's testimony [R. 195] the method which he urged was that he act as the agent of appellee; overages which he might obtain between the cost to appellant and the sale price to the American purchaser would be subject to participation by each party on some agreed basis. This basis was undetermined at the date of the contract in the case at bar. Never was there a thought that Mr. Whipple would contribute capital or buy or sell on his own account. Always he was to act exclusively as agent.

The letter of April 3, 1946 [R. 197; Ex. 18] refers to preceding correspondence of date March 20th and 27th. Development of the glucose trade was therein instituted wherein it was contemplated that appellant would buy the glucose and sell to the consumer principal obtained by Mr. Whipple. Payment would be made by the consumer's Letter of Credit to appellant in Buenos Aires. A tentative arrangement was outlined of 1% of cost to appellant and a reservation by Mr. Whipple from his commission of

some equitable portion to be paid to appellant as the circumstances in the particular case would develop. Mr. Whipple, under the plan, on each occasion, would inform appellant of "the name of the purchaser and the quantity needed" so that appellant could accept or reject the proposed contract.

Appellee always was informed and always knew that Mr. Whipple was negotiating for an Argentinian principal and in no respect acting as principal himself. On May 14, 1946 [R. 107], Mr. Whipple informed Mr. Donnelly that "a short time previously my principals in Buenos Aires had available 1300 tons." On May 20th, Mr. Baglin requested Mr. Whipple to cable his principals [R. 110] to ascertain if the 1300 tons was available. In his letter of May 20th [R. 113; Ex. 2], Mr. Baglin stated that appellee "would like the opportunity of purchasing this quantity (300 tons) in addition to the 1000 tons" and, acknowledging the agency of Mr. Whipple, stated "It is understood that we will be purchasing by letter of credit direct from the Argentine shipper." In his letter of May 21st [R. 117; Ex. 3], Mr. Whipple informed appellee that "you can arrange your credit to Cia Engraw."

Contrary to the statement made in appellee's brief (pp. 56 and 57), Mr. Whipple, on May 21, 1946 [R. 161; Ex. C] informed appellant that appellee was the purchaser with whom he was negotiating. Cable expense traditionally involves brevity of expression. The reference which is made to Exhibit 33 by appellee is hardly permissible, in view of the fact that this exhibit is marked only for identifica-

tion. Its introduction into evidence was barred on the objection of appellee [R. 229-300].

Also contrary to the testimony is the statement in appellee's brief (p. 57) that "Whipple made his agreement with plaintiff for the sale of the glucose at 1.30 pesos" and "without advising plaintiff he negotiated with defendant for the sale at 1.375 pesos." The short answer is that Mr. Whipple, in all of his negotiations with appellee, was operating strictly in accordance with the original plan. His compensation as agent for appellant was authorized in the letter of April 3rd. The cable from appellant to Mr. Whipple, of May 21, 1946 [R. 160; Ex. B] was merely an instruction as to quantity available and price required in order that Mr. Whipple could appropriately re-price to the consumer. The evidence was that, on May 20th, Mr. Whipple received from Mr. Baglin a verbal commitment which Mr. Baglin stated he would confirm in writing. The actual confirmation was the rather loose offer from appellant of date May 20th [R. 112; Ex. 2]. It manifests the agency of Mr. Whipple and that the purchase was to be "direct from the Argentine shipper." Mr. Whipple's testimony, above reviewed, and the letter of April 3, 1946 [R. 197; Ex. 18] all showed that Mr. Whipple was fully authorized by appellant to conduct the negotiations in the very manner in which he did as agent for appellant.

On May 23, 1946, Mr. Whipple, by letter [R. 165; Ex. F] advised appellant of the terms of sale. Appellee doubtless has again overlooked this documentary evidence produced by itself on its examination

of Mr. Whipple, when it states in its brief (p. 58) that appellant was never advised. True, appellee claims the May 23rd letter, mailed on May 24th [R. 123; Ex. 5], contains some conditions. Subsequent analysis will show that appellee is again in error. The correspondence between appellant and Mr. Whipple was in absolute conformity with the original plan for the operation of the agency of Mr. Whipple.

B. The Contract Was Made by Its Very Terms Between the Parties to This Action.

Never did appellee extend any credit to Mr. Whipple. Always was it advised that he acted only as agent for his disclosed Argentinian principal. [R. 113, 117, 122, 124, 406, 408, 410, 412, 413; Exs. 2, 3, 4, 5, 56, 57, 58.] The contract is, by its terms, clearly, definitely and certainly between appellant and appellee. Any attempt to insert the name of Mr. Whipple as a principal therein is unjustified in fact and is an attempt by parol argument to vary the terms of the written instrument. The testimony to which appellee makes reference in no sense accomplishes the result which its counsel seeks. Nowhere in the evidence is one single thought shown in the minds of any of the parties but that the contract was between the parties to the action. In the four contract letters and in Mr. Donnelly's report to Mr. Kiefer [R. 408; Ex. 58], in the check of financial standing of appellant made by appellee [R. 835-838; Ex. R-3], it is apparent that appellee well understood and at all times relied upon the fact that it was purchasing from appellant and from no one else. It is true that Mr. Whipple was thousands of miles away from his principal; that he was dealing in a commodity with a rising, highly specu-

lative market, and dealing with a vendee of known, well-established credit. He was required to believe and did believe it necessary to take great responsibilities upon himself in the consummation of a transaction in which the vendor and the vendee were both anxious to procure immediate action. But at no time did he act other than as agent under the general instruction of his principal.

1. Parol evidence cannot be received to contradict, vary, add to or subtract from the terms of a valid written instrument.

Harrison v. McCormick, 89 Cal. 327, 26 Pac. 830.

"We do not see how the admission of this evidence can be sustained. Its effect was to show that coal was sold by sample, and thereby to import into the contract a warranty that the coal sold was to be equal to the sample. When the contract is in writing, and nothing in the written contract indicates that a sample was used or referred to, parol evidence cannot be allowed to show a sale by sample. . . .

"It is claimed that the agreement proven by plaintiff was a mere informal memorandum, incomplete upon its face, and not intended to contain all the terms of the contract, and that for this reason the oral evidence was proper. We do not so regard the writing under consideration. It contains within itself all that is necessary to constitute a contract, and this being so, in the absence of any averment in the answer of defendants that there was an omission or mistake made in reducing it to writing, it is not competent to show by oral evidence that it does not state all of the terms of the agreement.

"The question whether a writing is upon its face a complete expression of the agreement of the parties

is one of law for the court, and the rule which governs the court in its determination has been well stated as follows: 'If it imports on its face to be a complete expression of the whole agreement,—that is, contains such language as imports a complete legal obligation,—it is to be presumed that the parties have introduced into it every material item and term; and parol evidence cannot be admitted to add another term to the agreement, although the writing contains nothing on the particular one to which the parol evidence is directed."

Pacific States C. Co. v. Steiner, 192 Cal. 376-7, 220 Pac. 304;

Harding v. Robinson, 175 Cal. 534-40, 166 Pac. 808;

Heffner v. Gross, 179 Cal. 738-42, 178 Pac. 860.

"Section 1625 of the Civil Code and Section 1856 of the Code of Civil Procedure do more than declare rules of evidence. They lay down positive, substantive law. 'These sections declare a rule of law so long and so well established that it is needless to cite further authorities in its support."

Estate of Gaines, 15 Cal. 2d 255-64, 100 P. 2d 1055.

"The parol evidence rule, as is now universally recognized, is not a rule of evidence, but is one of substantive law. . . ."

Jones on Evidence, 3rd Ed., Sec. 434, p. 656;

32 *C. J. S.,* Sec. 851, p. 784.

2. Parol evidence, even though admitted without objection, must be ignored as of no legal import and its incompetency to vary a written contract is a matter of law.

Liftov v. Hershman, 80 Cal. App. 2d 422-32, 182 P. 2d 222;

Rottman v. Hevener, 54 Cal. App. 474-79, 202 Pac. 329;

Hall v. Remp, 73 Cal. App. 2d 377-81, 166 P. 2d 372.

II.

The Two Contracting Corporations Were Each Bound by the Meeting of the Minds of Their Respective Contracting Agents Thereunto Duly Authorized.

A. The Knowledge of the Respective Contracting Parties and Their Agents.

Second, in the orderly construction of a contract is a consideration of the meeting of the minds and acceptance by each party of the contractual terms. The portions of the brief of appellee extending from page 24 to page 42 are here considered. Argument and citations dealing with the parol evidence rule given under the preceding heading necessarily have strong effect upon the treatment here given.

Appellee had full knowledge of the respective terms of the contract and the meaning of each term. This is clearly shown in the letter of Mr. Donnelly, appellee's duly authorized contracting agent, to Mr. Carl J. Kiefer, his superior, under date of May 23, 1946, and May 24, 1946 [R. 408-412-413; Ex. 58]. The contract is there

carefully restated at length and in detail. Advice is given that Mr.Donnelly has acknowledged and accepted the contract as made. This was in accord with his letter to Mr. Whipple of May 23 and May 24, 1946 [R. 123; Ex. 5].

Appellant had full knowledge of the respective terms of the contract and the meaning of each term [R. 146, 147]. It was, in fact, stipulated in open Court, that the original documents constituting the contract were sent to Mr. Berger by Mr. Whipple [R. 146-147]. Advice that all terms, conditions and negotiations of Mr. Whipple were satisfactory to appellant was conveyed to appellee by the cables of June 5th and June 8th [R. 272 and 279; Exs. 27 and 28]. However, the exact knowledge which Mr. Berger may or may not have had is entirely immaterial, except upon the part of ratification. There is no question but that Mr. Whipple had full knowledge, at all times, of the contract terms. His knowledge is that of his principal and his principal's that of himself.

The meeting of the minds of the two contracting agents of the parties is clear. Both Mr. Whipple and Mr. Donnelly had full and complete knowledge of each and every part of the contract as made. Statements such as that on appellee's brief (p. 41) that there was no agreement on quantity and price are simply without warrant. Definite was the agreement for quantity, 1135 tons; price 1.375 pesos per kilogram, exchange rate 335.82 pesos to $100.00; period and amount of shipment as in shipping schedule; terms of payment, by letter of credit, paid on delivery on board ship Buenos Aires Harbor, packaging in wood cooperage, 660 pounds each, analysis of commodity, certificate of analysis and of cooperage to accompany draft under letter of credit and finally the ac-

ceptance of the purchase, by letter of acceptance to Mr. Whipple for transmission to appellant [R. 408; Ex. 58].

The knowledge of the two respective agents for the contracting parties being clear, the contracting parties themselves are conclusively held to have possessed all knowledge of their respective agents.

Restatement of Law of Agency, Sec. 272, p. 603;
Watson v. Sutro, 86 Cal. 500-516, 24 Pac. 172.
Shamlian v. Wells, 197 Cal. 716-20.

"The general rule is well settled that the knowledge of the agent in the course of his agency is the knowledge of the principal. (1 Cal. Jur. 846, and cases cited.) It rests on the assumption that the agent will communicate to his principal all information acquired in the course of his agency and when the knowledge of the agent is ascertained the constructive notice to the principal is conclusive."

Vanceil v. Kumle, 26 Cal. 2d 732-34, 160 P. 2d 802;

Shapiro v. Equitable L. Ins., 76 Cal. App. 2d 75-87, 172 P. 2d 725.

". . . One who acts through an agent will be presumed to know all that the latter learns concerning the transaction, whether it is actually communicated to the principal or not. There is no difference in this respect between actual and constructive notice. It is of no avail that the agent failed to communicate to his principal what he had ascertained."

The cables passing between appellant and Mr. Whipple are under the rule relating to the interchangeable knowledge of principal and agent above noted, wholly immaterial. They in no respect bear out the contention which appellee seeks to make. In so far as any reference to any of them seeks to vary or modify the terms of the written contract, such evidence is, as noted in the preceding heading, wholly incompetent under the parol evidence rule. Under the rule of the *Rice-Schmid* cases, considered in appellant's opening brief, the fact of the purchase or holding by appellant of any glucose tonnage is irrelevant.

The references in the brief of appellee from pages 26 to 31 and from pages 33 to page 36 do not merit further discussion. It is proper to note that the statements on page 32 that appellant accepted an offer at 1.30 pesos per kilo, that Mr. Whipple ever made an offer, or that appellant ever claimed that the cable of May 22nd was either an offer or an acceptance are simply incorrect. As noted under the preceding heading, these communications were solely instructions to appellant's agent, Mr. Whipple, in accordance with the plan of the April letter.

B. The Form of the Contract May Be Oral or Written.

The contract in the case at bar is a contract for the purchase and sale of merchandise of a value of more than Five Hundred ($500.00) Dollars. It was made in California. It is, therefore, subject to the law of that state.

California has adopted the Uniform Sales Act. There the form of the contract is prescribed in

> *Civ. Code,* Sec. 1723.
>
> "Subject to the provisions of this act and of any statute in that behalf, a contract to sell or a sale may be made in writing (either with or without seal) as by word of mouth, or partly in writing and partly by word of mouth or may be inferred from the conduct of the parties."

Each of the four letters evidencing the contract commences with stating substantially as does the confirmatory letter of May 23-4, 1946:

> "This will confirm our telephone conversation." [R. 123; Ex. 5.]

The whole contract was actually made by the oral telephone offers and acceptances. The letters themselves only purport to confirm the oral conversation and evidence therein. The oral testimony in Court verifies this position. The pleading alleges that to be the case [R. 55].

> "that said contract was evidenced by four letters in writing passing between plaintiff and defendant, respectively of dates May 20, May 21, and May 23, 1946."

The various strictures upon the contract made by appellee, if they were valid at all, could only be so if the letters were the sole basis for the formation of the contract. They, however, in and of themselves, prove that they were only confirmation of the extended, various telephone conversations containing the offers and acceptances. The letters solely constitute the necessary memorandum under the

Statute of Frauds (Civ. Code, Sec. 1724). Appellee itself has given to the Court a clear, definite and comprehensive statement of the contract terms in the letter from Mr. Donnelly to Mr. Kiefer" [R. 411; Ex. 158]. This was sent after a telephone conversation with Mr. Whipple, is a résumé thereof, and expresses the fact that he has acknowledged and accepted the offer of Mr. Whipple on behalf of appellant. This letter, as the trial Court held, in and of itself, was sufficient to constitute the necessary memorandum in writing [R. 58]. This doubtless was one of the substantial items of evidence upon which the Court relied in its decision and findings.

The oral agreements of the parties, as evidenced in the letters of Mr. Donnelly to Mr. Whipple and covered by his letter to Mr. Kiefer, clearly shows the contract as made. This oral agreement, under the pleadings and under the law, is the agreement.

Clarke v. Fiedler, 44 Cal. App. 2d 838-41, 113 P. 2d 275;

Gibson v. La Salle Institute, 66 Cal. App. 2d 609-631, 152 P. 2d 774.

"But section 1723 of the Civil Code, which is a part of the Uniform Sales Act, provides that a contract to sell, or a sale, may be made in writing or by word of mouth, or partly in writing and partly by word of mouth, or may be inferred from the conduct of the parties. And section 1724 of the Civil Code, which is the same as section 1624a of that code, does not require that all of the details of a contract of sale be set forth in the writing. The note or memorandum of a contract of sale is merely evidentiary. In *Clarke v. Fiedler,* 44 Cal. App. 2d 838, 846

(113 P. 2d 275), the court said that 'the formal written contract is not the agreement of the parties, but only evidence of that agreement.' "

Reference may be here made to the cases cited under the immediately succeeding heading which in large measure are apropos.

C. The Ratification.

The contract was complete with the acceptance letter from appellee of date May 23-4 [R. 123; Ex. 5]. It was stipulated in open Court that appellant had full knowledge of the terms and wording of the last-mentioned letter [R. 147]. On June 5, 1946, prior to any notice of repudiation, appellant confirmed the entire contract for the sale of 1135 tons by its cable of that date to appellee [R. 272; Ex. 27]. Thereby each and all of the terms, conditions, covenants and agreements contained in the contract were accepted and confirmed by appellee. This, in itself, renders fruitless the animadversions of appellee, now made. The cable clearly stated that appellant, acting in good faith on the confirmation letters had purchased the 1135 tons for delivery thereunder.

Appellant filed its suit herein. At the time of filing, it had full knowledge of the terms and conditions of the contract and of the various operations of Mr. Whipple in negotiating and concluding the contract. The filing of the action with such full knowledge was a complete ratification of all preceding acts.

Cowan v. Tremble, 111 Cal. App. 458-63, 296 Pac. 91;

Harper v. Goldschmidt, 156 Cal. 245-50, 104 Pac. 451.

D. The 400 Ton Oral Contract.

The parties clearly and definitely dealt in the four letters with a contract for the purchase of 1135 tons and no more. This is evidenced by the contemporaneous letter of Mr. Donnelly to Mr. Kiefer. Mr. Whipple testified [R. 131] that in a telephone talk with Mr. Baglin on May 28th, he offered to Mr. Baglin, the assistant to Mr. Donnelly, 200 to 400 tons of glucose on the same terms and conditions as the 1135 ton offer and Mr. Baglin then and there accepted. This was, therefore, a second oral contract upon which suit was not filed. The fact of the purchase of the glucose, as noted in the opening brief under the rule of the *Rice-Schmid* cases is wholly immaterial, except possibly to show the ability on the part of appellant to perform.

E. The Letter of Credit (Br. p. 36.)

"The mechanics of payment were not a condition precedent in the consummation of the contract, and were not considered such by the parties" [R. 58] is that which the trial Court held in its decision.

A letter of credit is nothing more or less than a guarantee that the contract price will be paid. In this case, it was to be a guarantee by an American bank to a bank in Buenos Aires that appellee would pay the purchase price of the glucose.

California Civ. Code, Secs. 2858 *et seq.;*

38 *C. J. S.,* Sec. 7, p. 1142;

9 *C. J. S.,* Sec. 176, p. 384.

The letter of credit could, in no way, be a part of the contract. (Mr. Donnelly testified that the terms of the

letter of credit were not discussed [R. 689].) In fact, Mr. Donnelly knew nothing about the form of such letter [R. 688]. The letter of credit is a well known document of comparatively simple form. Appellee by its contract with appellant agreed that it, the appellee, would make a contract with a third party and would thereby procure a surety that appellee would pay at Buenos Aires the stipulated purchase price at the respective times of delivery. Breach of this obligation by appellee could well be held a breach of its contract. But it was only a part of the mechanics of payment, as the Court stated. Necessarily, all of the terms of the contract with the third party surety could not enter into this purchase contract.

F. The Delivery to McCormick Steamship (Br. p. 37).

"The price listed is F.O.B. steamer, Buenos Aires, packaged in wood cooperage containing approximately 660 pounds each" [R. 124; Ex. 5] is the wording of the contract acceptance by Mr. Donnelly; this is reiterated in his report to his superior, Mr. Kiefer [R. 400; Ex. 58]. These two documents also show that the first delivery of 50 tons was to be made in June. Mr. Whipple informed appellee in his letter of May 23rd [R. 122; Ex. 4] that "the next boat starts loading about the 29th and will sail on June 9th."

Appellee, under the contractual terms was under the duty to notify appellant that it had engaged space in a particular freight steamer loading in Buenos Aires Harbor on a certain date in June and that the master of such steamer would accept on board the 50 tons of glucose as freight for carriage to the United States. If appellee

did not give appellant timely notice that a certain freight steamer would accept said freight during the month of June and in each delivery month thereafter, appellee would be liable for breach of contract. The duty of appellant under this F.O.B. contract did not require it to select a steamer or to pay the freight. As appellee was required to pay the freight, it must select and designate to appellant the steamer. Whether appellee made the designation in its acceptance letter or at a later time is immaterial. It was a designation which unquestionably could have later been changed by appellee and appellant could have made no objection to such change under the rule of

Meyer v. Sullivan, 40 Cal. App. 723-31.

G. The Metric Tonnage (Br. p. 37).

The four letters clearly speak of metric kilogram and tons; reduction is even made to the equivalent in pounds and the price in pounds and dollars is calculated from the metric measure and pesos. Therefore, it is difficult to ascertain on what basis appellee can possibly claim that metric tonnage was not described. The letter of Mr. Baglin of May 20th [R. 112; Ex. 2] does speak of a price of 22.3¢ per pound Pacific Coast port. But Mr. Whipple's reply [R. 116; Ex. 3] corrects these statements. It gives the peso price per kilogram and transmits that into the dollar price per pound. He definitely states that 1 kilogram is the equivalent of 2.2046 pounds. In the letter from Mr. Whipple of May 23rd [R. 122; Ex. 4] he plainly states: "You will understand that they confirm actual purchase for your account of *1135 metric ton* of glucose in accordance with shipping schedule given."

H. The Acceptance Was Complete.

It is a truism of the law of contracts that the acceptance of an offer must be absolute and unqualified. Appellee in its brief (pp. 38 to 42) advances nothing but that which everyone knows. But the claim that the acceptance in the case at bar contained any request for modification or change of terms is simply not in accordance with the facts, findings and documentary evidence which has heretofore been thoroughly analyzed.

a. Appellee undertook to accept and pay for the glucose at the specified delivery dates. It undertook to procure a surety on a letter of credit that this payment would well and truly be made. The offer as evidenced by letter so requires [R. 117; Ex. 3]. The acceptance as evidenced by letter so confirms [R. 124; Ex. 5].

b. Appellee undertook to accept delivery on board a ship in Buenos Aires Harbor. It undertook thereby to engage a vessel to carry the freight and pay the carrier for that service. It undertook impliedly to notify appellant of the name of the vessel so appointed as carrier both in June and in each subsequent delivery month which would accept the deliveries under the contract. The offer so requires and the acceptance so confirms. For expedition it gives the name of the carrier selected.

c. Appellee and appellant both clearly knew that the letter of acceptance was the final closing of the contract. The purchase order was never intended to be signed or accepted by appellant. This is developed in the immediately succeeding heading.

d. The metric tonnage was an integral part of the actual offer [R. 116, Ex. 3, and R. 122, Ex. 4]. This was accepted by appellee [R. 124; Ex. 5]; in accepting the price at 1.375 pesos per kilogram.

e. Forsooth, if there were any point to these cavilings of appellee, they would be dispelled by the acceptance cable of appellant to appellee of date June 5, 1946 [R. 272; Ex. 27].

The governing rule, in cases such as this, is given in

17 *C. J. S.*, Sec. 43, p. 384.

"If an offer is accepted as made, the acceptance is not conditional and does not vary from the offer because it . . . contains terms not in the offer, but which the law implies as a part of the offer or because of a request or suggestion to have the contract more formally drawn up and executed."

The cases cited by appellee under this head bear in themselves proof that they are, under the evidence, inapplicable to the case at bar. The manifested intention of the parties in this case at bar was that the contract evidenced by correspondence was the only one to be signed or executed by the parties. Mr. Donnelly, in so many words, has said so. The cases cited by appellee all hold substantially that when both parties agree that the contractual relationship will arise only when a subsequent contract is reduced to writing and signed by both, then they must await the execution of such writing. In the case at bar, Mr. Donnelly himself stated that the letters which he summarized in his report to Mr. Kiefer [R. 408; Ex. 58] contained all of the details. Examination of the letters has shown that, in this, he was correct. The true

rule applicable to the case at bar is, therefore, that set forth in the line of cases.

Allan v. Guaranty, 176 Cal. 421-27, 168 Pac. 884;

Conner v. Plank, 25 Cal. App. 516-18, 144 Pac. 295;

Nolte v. Sou. Cal. H. B. Co., 28 Cal. App. 2d 532-4, 82 P. 2d 946;

Producers Fruit v. Goddard, 75 Cal. App. 737-63, 243 Pac. 686.

Both of the last-cited two cases distinguish the cases cited by appellee.

Church v. Wade, 80 Cal. App. 2d 412-19, 182 P. 2d 212.

"The futility of appellant's claim that the understanding between decedent and defendants was that before a contractual relationship should exist between them after their oral agreement, the terms thereof should be reduced to writing and signed by them, is manifest from what was said by this court in Kreling v. Walsh, 77 Cal. App. 2d 821, 834 (176 P. 2d 965) (hearing denied by the Supreme Court) as follows: 'Furthermore, a contract to make or execute a written agreement, when in all respects the terms thereof are mutually understood and agreed upon, is as valid and obligatory where no statutory objection interposes, as the written contract would be if executed. The test is—did the minds of the parties meet; that a proposal for a contract was made by one party and accepted by another; that the parties definitely understood and agreed upon the terms of the contract; and, finally that as a part of the mutual understanding it was agreed that a written

contract embodying the terms agreed upon should be prepared and executed by the respective parties. Under such circumstances, neither party is at liberty to refuse to perform. (*Thompson v. Schurman,* 65 Cal. App. 2d 432, 440 (150 P. 2d 509); *Nolte v. Southern California Home Building Co.,* 28 Cal. App. 2d 532, 534 (82 P. 2d 946); *Clarke v. Fiedler,* 44 Cal. App. 2d 838, 847 (113 P. 2d 275).)' "

The cited *Clarke v. Fiedler* case, at page 847 cites and quotes with approval a case apropos to the case at bar.

"The reason for the rule is thus aptly stated in *Sanders v. Pottlitzer Bros. Fruit Co.,* 144 N. Y. 209 (39 N. E. 75, 43 Am. St. Rep. 757, 29 L. R. A. 431): 'Any other rule would always permit a party who has entered into a contract like this, through letters and telegraphic messages, to violate it, whenever the understanding was that it should be reduced to another written form, by simply suggesting other and additional terms and conditions. If this were the rule the contract would never be completed in cases where, by changes in the market, or other events occurring subsequent to the written negotiations, it became the interest of either party to adopt that course in order to escape or evade obligations incurred in the ordinary course of commercial business. . . . If the parties did not become bound in this case they cannot be bound in any case.' "

Kreling v. Walsh, 77 Cal. App. 2d 821-34, 176 P. 2d 965.

"Furthermore, a contract to make or execute a written agreement, when in all respects the terms thereof are mutually understood and agreed upon, is as valid and obligatory where no statutory objection

interposes, as the written contract would be if executed. The test is—did the minds of the parties meet; that a proposal for a contract was made by one party and accepted by another; that the parties definitely understood and agreed upon the terms of the contract; and finally, that as a part of the mutual understanding it was agreed that a written contract embodying the terms agreed upon should be prepared and executed by the respective parties. Under such circumstances, neither party is at liberty to refuse to perform."

Thompson v. Schurman, 65 Cal. App. 2d 432-40, 150 P. 2d 509.

"The rule is well established and uniformly followed that when the respective parties orally agree upon all the terms and conditions of a contract with the mutual intention that it shall thereupon become binding, the mere fact that a formal written agreement to the same effect is to be thereafter prepared and signed does not alter the binding validity of the original contract."

17 *C. J. S.,* Sec. 49, p. 392;

Restatement of Law of Contracts, Sec. 26.

"Mutual manifestations of assent that are themselves sufficient to make a contract will not be prevented from so operating by the mere fact that the parties also manifest an intention to prepare and adopt a written memorial thereof; but other facts may show that the manifestations are merely preliminary expressions as stated in Sec. 25."

It was necessarily implied by the very terms of the contract that appellee would pay for the goods purchased. The Court stated that the "mechanics of payment were not a condition precedent" and the oral testimony demonstrates that part; likewise, the designation of the carrier was necessarily implied by the very terms of the contract. The metric tonnage was an integral part of the contract. The purchase order was not intended to be signed or to, in any way, affect the contract, as evidenced by the written acceptance. The case at bar, in no respects, comes within the ambit of the theory stated by appellee, but by outlining things which appellee was bound to do, demonstrates that it, in itself, was and was intended by the parties to constitute the complete contract acceptance.

I. The Decision of the Trial Court.

A trial judge of long experience, both on the State and Federal Bench has heard the evidence of the parties. He is a jurist noted for the thorough study which he gives to the facts and law applicable thereto in every case coming before him. Such a Court, so endowed, has seen and heard the witnesses in the case. He has coordinated the testimony as in the making of the contract with the testimony as to the actual construction placed by the parties upon the four letters evidencing that contract. He has considered the acts of appellant. He has noted the respective witnesses, Mr. Whipple and Mr. Berger for appellant and Mr. Donnelly and Mr. Baglin for appellee. He has pondered over the contemporaneous construction placed thereon by Messrs. Metcalf and Dichter in their

dealings with Mr. Berger, as outlined in opening brief, pages 28 to 33. He has considered the rule of the California Civil Code, 1783. He has considered that the four letters only purport to be confirmation of oral telephone communications between the parties and that the letters themselves are the substance of those oral negotiations and offers and acceptances made by telephone. He noted and gave due effect to appellant's cables of June 5th, 1946, sent after full knowledge by appellant of the May 23-24 acceptance letters from appellee. With all of these facts and the law pertaining thereto before him, aided by the arguments of counsel, as here outlined, and having the full effect of Section 1783 in mind, he found a fully valid contract on his decision [R. 58].

> "1. I find that a valid contract was entered into by the plaintiff and the defendant. The written communications between the parties set forth fully the essential conditions of the transaction. The mechanics of payment were not a condition precedent to the consummation of the contract, and were not considered such by the parties. More, I am of the view that the office memorandum, dated May 23, 1946, signed by J. B. Donnelly (Plaintiff's Exhibit 58), is a sufficient memorandum embodying all the elements of a valid contract, even if the documents which preceded it were not legally sufficient. (See, Restatement, Sec. 209; 2 Williston on Contracts, Revised Ed., 1936; Sec. 579; Moss v. Atkinson, 1872, 44 C. 3; McKevitt v. City of Sacramento, 1921, 55 C. A. 117). The letter speaks of a consummated purchase and of a letter of acceptance which was being sent to Engraw's representative. These statements are not the declarations of a subaltern, but those of an authorized executive whose interpretation of the transaction sets forth clearly its purport."

III.

The Contract Composed of the Four Letters Contains All of the Terms Agreed Upon and No Future Negotiations Were Contemplated.

The contract is one for the purchase of 1135 tons of glucose with delivery F.O.B. ship at Buenos Aires Harbor. The periods of delivery were seven in number at different monthly periods and amounts. The price to be paid, including the rate at which the foreign exchange would be settled were set forth. The specifications of quality and manner of shipment were fixed. Appellee claims, however, that inasmuch as it mentioned a purchase order to be issued by it, its own failure to issue such purchase order caused the contract to be incomplete. It admits that the purchase order was not to be executed by appellant and that no further negotiations were contemplated.

A. The Contract as Evidenced by the Letter Was Intended by Each Party to at Once Take Effect as a Complete Contract.

The evidence is replete with statements of each party that they were here dealing with a product, the subject of a highly speculative market. Clear it is that appellee was very anxious to secure immediate delivery [R. 710]. Essential it was that the contract for future deliveries at a specific price be given prompt action. Delay would be perilous. No one could await the mailing of a formal document from the United States to Buenos Aires and no one ever intended that such be done.

B. The Negotiating Agents Intended That the Letters Evidence a Complete Contract.

On May 22nd, Mr. Donnelly conferred with his superior, Mr. Kiefer. On May 23rd and 24th, he wrote him a letter to "confirm our conversation of yesterday." In this letter [R. 408; Ex. 58] and doubtless in the conversation referred to therein, he outlined the whole contract and stated:

> "We believe there are two possible methods of handling the mechanics of purchasing this material and because of the size of the order we favor the first.
>
> We will advise Whipple, by letter, of acceptance of the 600 tons at the price quoted, for further transmission to Engraw [R. 411]."

He also stated in that letter [R. 410]:

> "I will accept the additional 700 tons of 1946 material if it can be made available."

He suggests two methods for a purchase order issuance [R. 411]:

> "Preparation in Cincinnati of 'the necessary purchase orders *for direct transmittal to Engraw in Buenos Aires,* and at the same time arrange for the letter of credit through our New York Bank to cover this purchase.'
>
> The second method would be to have our West Coast Purchasing Department issue the purchase order, with copy to Cincinnati. You or Del Eberts could then arrange for the proper letter of credit to be issued from New York to cover the purchase.
>
> *I believe the information contained herein is sufficient to issue the purchase order.* I would appreciate your advising me if you intend to have Del follow through on this.

We have written a letter of acceptance to Mr. Whipple, copy of which is attached for your information."

He then notes in his postcript to the letter to Mr. Kiefer that notice has been received that appellant was able to deliver 1135 tons and states:

"We therefore have changed our letter of acceptance accordingly." [R. 412.]

The letter of acceptance to Mr. Whipple here appears as an integral component of the letter to Mr. Kiefer and contains the clear unequivocal statement:

"We wish to *acknowledge and accept* the offer of Cia Engraw Commercial & Industrial S. A. of 1135 tons," etc.

The only tenable construction which can be placed upon this letter is that the letter to Mr. Whipple of May 23-24 was and was intended by the parties, especially by appellee, to be the final conclusion of the contract. The two methods involved merely relate to whether the purchase order will be issued in Cincinnati or in San Francisco and it is stated in the letter that the information contained there will be sufficient to issue the purchase order.

The oral testimony clarifies the situation, Mr. Donnelly testified [R. 692]:

"Q. You never mentioned anything to Mr. Whipple at any time about ever requiring the signature of Engraw for anything, did you? A. No, sir, I did not."

Therefore, there was no intention that appellant sign the purchase order. The purchase order was merely a part of the accounting system of appellee. There was no

intent that it be or become the contract of the parties. There certainly was no intention that Mr. Whipple would sign the purchase order. The acceptance letter and the letter to Mr. Kiefer, in so many words, states [R. 124] that it will be sent to Buenos Aires.

> "A purchase order will be sent to Cia Engraw and Industrial S.A., as soon as possible, covering this purchase, and a letter of credit will be set up to cover the full amount in pesos."

As the trial Court stated, the purchase order was "a mere part of the mechanics." The letter to Mr. Kiefer speaks of a consummated purchase and of a letter of acceptance which was being sent to Engraw's representative.

C. The Purchase Order Was by the Negotiating Agents Never Intended to Be a Part of the Contract.

The terms of the purchase order were at no time discussed during the negotiations [R. 701]. Appellee presented in evidence that which was identified as the standard form of purchase order used throughout the organization of appellee. Mr. Donnelly testified that this was the form to which he had reference in his conversation with Mr. Whipple [R. 684-5]. Nowhere does it appear that Mr. Whipple had any knowledge of the contents of the purchase order.

The obverse side incorporates in the contract the 19 conditions on the reverse side. The pertinent portions are copied in the appendix. Various of the conditions are wholly inapplicable. Paragraph 7 directly contradicts the prices agreed upon and Paragraph 15 in that it seeks conformity of Argentina employees with American labor practices is idle.

But Mr. Donnelly himself testified [R. 678] as to a talk with Mr. Whipple on May 14, 1946.

> "He (Mr. Whipple) told me at that time that he was able to secure the glucose, that *would be above the ceiling price* and he assured me that it would not affect our sugar quota and that it was legal to bring it into the United States."

It was definitely understood between the parties as an essential provision of the contract of purchase that the glucose purchased would not be

> "invoiced at prices which compare to and comply with regulations or any amendment thereof, of the Office of Price Administration." (Appendix.)

D. A Binding Contract Is Effected When the Parties Have Agreed Upon All of the Essential Facts, Notwithstanding the Fact That a More Formal Instrument Was Later to Be Issued.

There is no lack of harmony between the cases cited by appellee and those hereafter cited as establishing the rule governing the case at bar. Substantially the rule of appellee's cases is that set forth in the excerpt from *Toms v. Hellman,* 115 Cal. App. 74, quoted by appellee:

> "For another reason the acceptance of the offers failed to make a contract, because *the offer by its terms clearly contemplated that the complete contract should be embodied in a written contract to be subsequently executed.*" (Italics added.)

The evidence incontrovertibly proves that the parties in the case at bar contemplated that the correspondence ac-

tually did evidence the complete contract; it further proves that the parties had no intention but that the purchase order to be issued would conform to the acceptance letter nor was there any intention that it in itself would form a contract or that it ever would be executed. The true rule is therefore that as set forth in such cases as *Columbia Pictures v. de Toth,* 87 Cal. App. 2d 621, 629, 197 P. 2d 580:

> "The cases are legion to the effect that when the respective parties orally agree upon all of the terms and conditions of an agreement with the mutual intention that it shall thereupon become binding, the mere fact that a formal written agreement to the same effect is to be prepared and signed does not alter the binding validity of the oral agreement. (*Johnston v. 20th Century-Fox Film Corp.,* 82 Cal. App. 2d 796, 820 (187 P. 2d 474); *Kreling v. Walsh,* 77 Cal. App. 2d 821, 834 (176 P. 2d 965); *Gibson v. De La Salle Institute,* 66 Cal. App. 2d 609, 630 (152 P. 2d 774); Thompson v. Schurman, 65 Cal. App. 2d 432, 440 (150 P. 2d 509); anno. 122 A.L.R. 1217, 165 A.L.R. 756.)"

Church v. Wade, 80 Cal. App. 2d 412-18, 182 P. 2d 212:

> "The futility of appellant's claim that the understanding between decedent and defendants was that before a contractual relationship should exist between them after their oral agreement, the terms thereof should be reduced to writing and signed by them, is manifest from what was said by this court in *Kreling v. Walsh,* 77 Cal. App. 2d 821, 834 (176

P. 2d 965) (hearing denied by the Supreme Court) as follows:

'Furthermore, a contract to make or execute a written agreement, when in all respects the terms thereof are mutually understood and agreed upon, is as valid and obligatory where no statutory objection interposes, as the written contract would be if executed. The test is—did the minds of the parties meet; that a proposal for a contract was made by one party and accepted by another; that the parties definitely understood and agreed upon the terms of the contract; and, finally, that as a part of the mutual understanding it was agreed that a written contract embodying the terms agreed upon should be prepared and executed by the respective parties. Under such circumstances neither party is at liberty to refuse to perform. (*Thompson v. Schurman,* 65 Cal. App. 2d 432, 440 (150 P. 2d 509); *Nolte v. Southern California Home Building Co.,* 28 Cal. App. 2d 532, 534 (82 P. 2d 946); *Clarke v. Fiedler,* 44 Cal. App. 2d 838, 847 (113 P. 2d 275).)"

Kreling v. Walsh, 77 Cal. App. 2d 821-4; 176 P. 2d 965;

Clarke v. Fiedler, 44 Cal. App. 2d 838-47; 13 P. 2d 275;

Nolte v. So. Cal. Home Bldg. Co., 28 Cal. App. 2d 532-34; 82 P. 2d 946;

Thompson v. Schurman, 65 Cal. App. 2d 432-40; 150 P. 2d 509;

Johnson v. 20th C. F. F. C., 82 Cal. App. 2d 796-820; 187 P. 2d 474.

The letters clearly evidence a contract of sale. Proof was adduced that there was no intention of making or executing any contract subsequent to that evidenced by the correspondence. Contrariwise, there was the distinct intention that a present contract had actually been concluded.

E. The Memorandum to Satisfy the Statute Is Sufficiently Evidenced by the Letters.

The written memorandum of the Contract of Sale is under the express mandate of Civil Code, Sections 1723 and 1724 and is merely evidentiary. It in itself need not be a formal contract. Substantially only these essential ingredients are required, to-wit, first, designation of the parties; second, the subject matter of the contract; and third, the price or consideration. The fourth element of a contract, that is to say, the meeting of the minds, in promise and acceptance, it is to be noted need not necessarily enter into the memorandum.

Gibson v. La Salle Institute, 66 Cal. App. 2d 609-31; 152 P. 2d 774;

Clarke v. Fiedler, 44 Cal. App. 2d 838-46; 113 P. 2d 275;

37 *C. J. S.,* Section 174, page 652;

Restatement Contracts, Section 207.

Every viewpoint clearly establishes that the correspondence including the letters between Messrs. Donnelly and Kiefer were and were by the parties intended to evidence a present contract of purchase and sale.

IV.

Proof of Illegality of the Contract Was Wholly Lacking. Ability to Perform at the Dates at Which Performance Was Required Was Proven.

The proof was abundant that the glucose was purchased ready for export at the periods required by the contract. Appellant proved that it made the necessary applications for export of the glucose and that these applications were accepted. The evidence disclosed that other applications later made were accepted and shipment thereon made. Glucose was continuously exported from Argentina throughout the whole of the contract period. The glucose under the present contract would have been exported except for the breaches made by appellee of its contract. Such is the proof, such is the decision of the trial Court [R. 61]. This heading relates to appellee's brief, pages 64 to 71.

A. The Pleading.

Upon information and belief appellee alleged [R. 51] that

> "the export of glucose from the Argentine Republic to any other country was specifically prohibited by the laws of the Argentine Republic, Nos. 12,591; 12,830 and Article 14 of Law No. 15,591 and regulations and orders regularly passed and made during the periods during which deliveries pursuant to the terms of said alleged contract were to be made by plaintiffs at a West Coast port of the United States."

Law 15,591 never existed as a law. During the course of the proceedings, these figures were stricken and the figures 12,591 inserted. So only two laws, 12,830 and 12,591 were pleaded. The contract deliveries were to be

made on ship in Buenos Aires Harbor and not at any West Coast port of the United States. By the very terms of the contract, appellant was not required to take the glucose out of Argentina.

The pleading, in itself, was wholly insufficient to raise an issue. It pleaded only a conclusion on information and belief that by these two laws the export of glucose was specifically prohibited. True, it likewise includes a second conclusion, likewise on information and belief, that under these laws there were regulations and orders regularly passed and that some prohibition at some time existed under such regulations and decrees. No trace of any place, time or substance of any of the mythical regulations or orders is given. A foreign law is a fact to be pleaded as any other fact. It is essential, under the invariable rule to plead the substance of the law relied upon so definitely that the Court may determine the meaning and effect thereof. As will be seen on the examination of the evidence, neither of the two laws pleaded contained any prohibition of export whatsoever. The circumstances of time, place or authority by whom any one of the alleged regulations or orders was passed, or any reference to any substance or content thereof is wholly omitted. Not even the scantiest conception of "notice" pleading could warrant acceptance of these vague generalities.

59 Corpus Juris, Sec. 746, p. 1205.

> "It is stated in general terms in many decisions that if a party relies on a foreign statute as the foundation of a cause of action or defense, the statute must be 'set out' or 'set forth,' or 'set out in terms,' or 'set out with certainty to a common intent at least.' It is not necessary, however, that the statutes be pleaded *in haec verba,* but it is necessary and sufficient that the substance of the statutes be pleaded, or, according

to terminology frequently used by the courts, that the substance of the statutes relied on be stated with sufficient distinctness to enable the court to determine the meaning and effect thereof. The fact that it is foreign statutes which are to be pleaded, it has been said, 'will afford no relaxation from the usual rules requiring a plain and concise statement in the petition, without unnecessary repetition, of the basic allegations constituting the cause of action.' "

Coronet Phosphate Co. v. U. S. Shipping Co., 260 Fed. 846.

It was held that it was only a pleader's conclusion in alleging that in consequence of the war "restraints, restriction and limitations that have been placed on shipping, both under neutral and belligerent governments, on shipments destined to Sweden and Holland," the Court further held that the pleader is bound to set out the substance of the foreign law so that the Court may judge whether it has the effect which the pleader ascribes to it.

Allen v. Markham, 156 F. 2d 653 (9th Cir., 1946).

A controversy over right of enemy aliens to take under a will of a decedent. The Circuit Court, in holding respondent cannot recover, stated, "It is conceivable that the foreign nation might without a treaty, have by its own statutes granted rights which were in fact fully reciprocal, if this were done by statute, it would have to be proved, and what must be proved to sustain a complaint must be alleged." There is no such allegation here.

The Baja, California, 45 Fed. Supp. 519 (1942 by District Judge Harrison).

In a controversy as to whether there was liability as the result of a shipwreck, defendant contended that the laws of Mexico should control the litigation and at the time of trial offered in evidence copies of certain laws, the Court stated, "The claimant defendant did not plead the foreign laws above mentioned and therefore the same were not admissible (21 R. C. L. 438-9)."

Valz v. First National Bank, 96 Ky. 543, 49 Am. St. Rep. 306, 309.

Where appellant attempted to plead the statute of limitations of a foreign state by alleging the effect of the statute the Court held such pleading to be defective, stating as follows:

> "There is no allegation as to the terms and provisions of the statute of Alabama; there are no allegations which authorize the court to conclude that the plaintiff's right of action was barred because the action was not instituted within three years after the cause of action accrued. In the absence of a plea which shows the action is barred by the laws of Alabama, we hold that it is governed by the laws of this state. As there is no plea that the statute of this state would bar the right to recover, it could not be made available."

B. The Pleaded Laws Contained No Prohibition on the Export of Glucose.

Law 12591 was in effect from September 11, 1939, the date of its promulgation, to September 16, 1946, the date of the promulgation of Law 12830. [R. 754-5-6; Ex. 61; R. 765-768; Ex. 62.] In Article 14 of Law 12591, the executive power was authorized to restrict or prohibit the exportation of commodities for the requirements of the state. Section 2, Law 12591 provided, however, that within ten days from promulgation of the law, that is, September 11, 1939, the executive power must manifest the products which the act shall control and it is only such products which shall be governed by the act. There is nothing in the evidence to show even remotely that glucose was, at any time, within the ten day period by the executive power determined to be within the commodities described in Article 1 of the Act. In fact, glucose has never appeared in any order or decree give under this law. [R. 755, 767; Ex. 61 and 62.] There is no known rule, regulation or law under which the export of glucose has been prohibited. [R. 756; Ex. 61.] Law 12830, as noted above, was passed subsequent to August 29, 1946, to-wit, September 16, 1946, and export of glucose was expressly permitted under an order of August 29, 1946.

No regulations or orders were, at any time, made prohibiting the glucose exportation [R. 756; Ex. 61]. The resolution of August 24, 1946, No. 6926/46 [Ex. C in Varela Deposition; R. 757; Ex. 61] was that of the Secretary of Commerce and Industry wherein an exportable quantity of 4000 tons of glucose was for the period July 1, 1946 to September 31, 1946. The resolution of September 12, 1946, No. 7499/46 [Ex. D in Varela Deposi-

tion; R. 757; Ex. 61] was of the same Secretary and stated:

The limitation on the export of glucose is 4000 tons for a six-month period. This was in effect only from August 29th to September 12th. From the last date, exportation was returned to the system of licenses in vogue up to June 16th.

Depositions were produced by appellee dealing with the export laws of Argentina. The testimony so produced was unanimous in stating that "the export of glucose was not specifically prohibited by any of the laws referred to" [R. 893, 908, 929; Ex. T1, T2, T3]. Each stated that in June or July of 1947, they made inquiry as to an order prohibiting the export of glucose. No detail of time, place or term of any so-called order was made. These unknown informants told the witnesses that during the beginning of May, 1946, a verbal order was made, stopping exportation of glucose [R. 897, 919, 986; Ex. T1, T2, T3]. It was further testified that no publicity was given to this order. "I understand the order was not made public, it was made known only to the exporters who requested export permits, which were not granted." "I understand there is no such record" [R. 919; Ex. T2] is the answer to appellant's Cross-Interrogatory 5 F. [R. 887], which asked if there was any record or minute in any office of any such verbal order.

The witnesses of appellee all unite in stating that publication either in the Official Bulletin of Argentina or by posting must be given [R. 901, 924, 940; Ex. T1, T2, T3]. Admittedly, no publicity was given to this alleged order. If such order ever was made, the lack of publicity would invalidate. It casts suspicion upon the fact itself of any such order.

Two of the witnesses agree that if, in fact, glucose was actually exported and permits therefore given subsequent to the alleged order, their opinion as to the verbal order would be fundamentally affected "because if new permits had been granted, it would prove the inefficiency of the verbal order to which I have referred [R. 938, 921; Ex. T3, T2]. Mr. Robiola denies there could have been any such permit or exportation [R. 899, Ex. T1]. The evidence now to be reviewed will establish exportation throughout the whole period, and that permits issued upon which exportation was made.

Both experts on Argentina law called by appellant, Dr. Varela [R. 753-4-759; Ex. 61] and Dr. Padilla [R. 765-768; Ex. 62] testified that there was no "legal obstacle to fulfill the contract in those months (between June and December 1946) since an export permit could be requested from the government." The experts were requested in the interrogatory 4 [R. 484; Ex. 60] to produce the pleaded laws, also a copy of each regulation and order passed under said laws and in Interrogatory 8 [R. 486; Ex. 60] to give their opinion as to whether any legal obstacle existed under Argentinian law which would render the performance of the contract at bar impossible. They each pronounced their professional opinion that no law, rule or regulation of the Argentine Republic was any obstacle to the fulfillment of the contract of appellant. No deliveries of glucose were prohibited by any law, decree, rule or regulation of Argentina.

The Court held the hearsay testimony of appellee's hearsay witness as having little weight or credence and so stated in its Decision [R. 60]:

> "I find that the plaintiff was able to perform the contract and no legal impediment has been shown to

exist for its performance. Regardless of the burden of proof, the evidence of an interdiction of export of glucose is, at best, very meagre. There is a showing that some one gave an oral order stopping the export of glucose for a short period of time in line with certain governmental price policy relating to the cost of living. No official publication of the order was shown. More, there is no showing that anyone in the Government considered it binding. . . ."

C. The Evidence.

Ample is the evidence proving beyond question that glucose throughout the period of contract deliveries from June to December 1946, both inclusive, was exported from Argentina and licenses therefor freely granted.

In the deposition of the Argentine dealers, the Eighteenth Interrogatory requested information as to exportation made and the incident details of payment of taxes and procurement of licenses. Mr. Dittisheim [R. 497-501; Ex. 6OA] testified that his firm had, during the period, shipped over 900 tons and that "Export licenses have been forthcoming and we have paid the usual tax of 5% for same." Mr. Auge testified [R. 507; Ex. 60B] to exportation of 171.6 tons of which 99.909 were exported during June 4, 1946 and that "The obtainment of export permits is done without difficulty." Mr. Lang's company, during the critical period, exported 1,475 tons. He detailed the dates of the shipments, amounts and places to which shipped. May, 62,800 kilos to the United States and 128,401 to Switzerland, and 24,784 to Palestine; June, 54,776 tons to the United States, 74,866 to Switzerland and 46,390 to Palestine; August, 104,310 to the United States, 59,699 to Switzerland; September, 97,822 to the United States, 6,150 to Switzerland, 47,849 to

Palestine; October, 84,804 to the United States; November, 178,675 to the United States; in December, 15,341 kilos to the Philippines. For each delivery, he had an export license in hand and delivered and shipped all glucose sales as stated.

Produced in evidence [R. 725 to 731] *were pages from the Monthly Résumé of Exportation,* a publication of the Bolsa de Commercio or Commercial Exchange, generally circulated among its members and in constant use which sets forth the total exportation from Argentina of all commodities. The pages produced in evidence related only to the exportation of glucose during the contract delivery months. The Exhibit [R. 732-8] show actual exports as follows: June, 841.6 tons; July, 135.2 tons; August, 1,066.1 tons; September, 178.5 tons; October, 107.2 tons; November, 935.1 tons; December, 53.9 tons.

The record of the dealers and of the Résumé of Exportation proves a constant and consistent exportation throughout each and every month of the contract period. No room is left for any plea of impossibility or inability to perform on this open, public and unbiased report of actual exportation.

Mr. Lang testified [R. 953] that he had been in business in Buenos Aires for ten years and engaged, among other things, in the exportation of glucose. He produced copies of three export permits authorizing the exportation of glucose. Each of these permits was stamped as received, by an official of the Bureau of Exportation and Importation, on May 28, 1946 [R. 955]. The tax receipts covering each of the permits were each dated June 11, 1946. The documents were received in evidence [R. 958-961; Ex. 71 to 71B]. The actual operation of the shipper is described in this testimony [R. 964]. The applications

are stamped as filed or within a day thereafter, then the tax is paid to the Central Bank, in this case on June 11th, *nearly two weeks after the application.* The receipt *is* obtained from the Bank. It is to be noted that the tax payment was not made for nearly two weeks from the application date. The Bank's tax receipt is then delivered to the Bureau of Export from whom the export license is procured. The export license is retained by the shipper until the merchandise is actually exported, at which time it is delivered to the custom house. The witness was thus unable to state whether he actually exported on the application filed May 28th in July or in August. No prohibition affected the *license or* exportation under these three licenses. Exportation under the license could legally be made at any time within 180 days from the date of its issuance [R. 987] and actual shipment subsequent to June 11th were actually made under this application of date May 28, 1946.

Exportation under the May 27, 1946 license application of appellant was prevented solely by appellee.

On May 27, 1946, appellant filed with the Argentine Director of Exports under law No. 12.591 a request to export to the United States 935 tons of glucose in wooden barrels of a value of 1.215.500 pesos [R. 247; Ex. 22, 23]. On July 4, 1946, it filed a second application to export 200 tons of glucose to the United States and upon the same date filed a third application to export 400 tons of glucose to the same destination. This made a total of 1,535 tons, embracing the 400 tons under the oral contract and the 1,135 tons under the contract evidenced by the letters. The two applications were necessary in that the application of May, under the Argentine rule was valid only for 180 days from date and so could cover only the

deliveries through November. The second application covered the December deliveries.

The Director of the Division of Permits for Export on receipt of the May 27th application replied to the application. He did not state that there was a ban on export licenses, but did state that in order to issue the permit, it was necessary to have a certificate of the manufacturer stating the quantity of glucose to be exported [R. 251; Ex. 24]. On May 30th, this certificate was furnished [R. 252; Ex. 25]. The only thing remaining to be done in order to secure the permit was to pay the tax. This tax could be paid at any time [R. 237, 258]. The tax on the 935 ton shipment of a value of 1,215,000 at 5% was 6,075 pesos the equivalent of fifteen hundred ($1,-500.00) dollars [R. 259]. Appellee failed to forward the letter of credit or designate a carrier or pay for the June shipment of 50 tons and for that reason only payment of the tax was delayed until the carrier was designated and the letter of credit received. But for the conduct of appellee of June 6th and its failure to arrange with the carrier and forward the promised letter of credit, appellant would have appeared at the Central Bank with its duplicate application, paid the 6,075 pesos, procured the receipt and export license would have issued. This was the course followed by the witness Lang, who filed his application a day later, on May 28, 1946, and paid his tax, June 11, 1946. Even more compelling is the fact, as it is evident from the conduct of appellee, that it had made no arrangement for the acceptance of delivery of the June glucose delivery upon a ship in Buenos Aires Harbor. Under the contract, appellant was required to make delivery upon such a ship. In fact, appellee appointed the ship of the McCormick line. This ship, as above noted, was loading May 29th and was due to leave

Buenos Aires June 9th, so it would be fruitless to pay the $1,500 tax when no ship was available, and appellee had given no notification that any ship would ever be available.

It necessarily was the duty of appellee to arrange with the carrier steamship company to accept in Buenos Aires Harbor the glucose and designate such carrier and ship available for carriage to appellant. Under the contracts of appellant the glucose was fully paid, free at ship's side. All that was required of appellant was to pay the five centavos per kilogram to land it on a ship designated by appellee. The very position taken by appellee requires the inference that no ship was designated to appellant. Appellee thereby prevented fulfillment of the conditions of its own obligations, thereby breached the contract and rendered itself incapable of relying upon such condition to avoid liability.

Bewick v. Mecham, 26 Cal. 2d 92-99, 156 P. 2d 757;

Pacific Venture C. v. Huey, 15 Cal. 2d 711-17, 104 P. 2d 641;

Carl v. Eade, 81 Cal. App. 356-8, 253 Pac. 750;

Restatement Contracts, Sec. 315.

Each party to a contract is under the duty to do everything that the contract presupposes that he will do to accomplish its purpose and a duty not to prevent or hinder performance by the other party.

Tanner v. T. I. & T. Co., 20 Cal. 2d 814-25, 129 P. 2d 283.

No ship having been designated to carry the June shipment, it would have been a wholly idle act for appellant to pay the tax of $1,500.00 and the stevedoring charges. Appellant well knew that it could, at any time, pay the tax and procure the export permit.

On June 30, 1946, Mr. Dichter, the employee of appellee, arrived in Buenos Aires and made a thorough independent investigation of the whole glucose situation. Admittedly, appellee was desirous of avoiding its contract. In case any ban on exports had existed, such as is now claimed, Mr. Dichter would have ascertained that fact and reported thereon. No plan such as he outlined and such as is described in the opening brief would ever have been made. Nor is it possible to conceive, from the very facts of the case at bar, that there was any ban on the exportation of glucose from Argentina during May of 1946. A responsible, careful business man, such as Mr. Berger, with the conservative background of his life [R. 220] and an actual resident in Argentina, making a sale involving nearly a half million dollars, certainly could not be imagined as being so totally and abysmally ignorant of conditions as to undertake to export the 1135 tons of glucose unless he well knew that export licenses were freely granted.

Request was made by appellee of the admission into evidence of Exhibit V, on October 21, 1948, although the trial ended June 9, 1948. Answer to this request was made October 26, 1948, wherein it was set forth that the original document was in Spanish, the translation proffered by appellee was incorrect; that it was on September 30, 1946 composed and sent by Dr. Medrano, who had been employed September 27, 1946. It was further therein stated that the statements of facts there made were incorrect and made on insufficient information of Dr. Medrano. Further, it was stated that the notice was a form of legal notice peculiar to Argentine mercantile customs, that the errors of fact therein stated were well known to the addressee and by reason of the various errors made

by Dr. Medrano, his employment was terminated. In the appendix attached hereto, there is a copy of the answer to request and a correct translation of the Spanish document. From the history of the case at bar, it will be noted that the facts insofar as they relate to appellee, are incorrect. From the contacts during July between the S. I. F. A. R. Company and Messrs. Berger and Dichter, they must have been known to be incorrect. The Exhibit V is not in the printed transcript, nor the proceedings relating to the admission thereof. For the purposes of this brief, it is to be noted that the correct translation states that "permits were not granted after last May." The evidence is clear, under Argentine law, that permits were granted under the express provisions of the August 29th order and of the September 16th order. The evidence is incontrovertible that a permit once issued was honored by exportation thereon during every one of the contract delivery months.

The June 16, 1946 governmental action solely effected a temporary suspension for study purposes of new export licenses and was expressly ineffective on exportation under previous permits.

Confirming the judicial notice which this Court would doubtless take of the accession of the Peron government to power in Argentina is the testimony of Mr. Lang that Juan Peron, although elected President in February of 1946, did not take office until June 4th of that year [R. 976]. He further testified [R. 976] that on June 16, 1946, the government proclaimed a campaign of 60 days to reduce the cost of living, which was given great publicity and this affected issuance of new export licenses. In no way, did this affect licenses theretofore issued. The witness Lang actually exported under such license after

June 16th on license issued before that date. He further testified "The Argentine Government never goes back on licenses already granted."

The Governmental proclamation clearly was not any regulation or order passed or made pursuant to either of the laws pleaded by appellee [R. 51] nor was it a specific prohibition as to the export of glucose or any other commodity. The proof shows that glucose was at all times exported. Granted that the Secretary of Industry and Commerce made some vague order. By the testimony of appellee's witness, it was effective only "until a study had been made of the maize market and of glucose in particular [R. 897, 911, 930; Ex. T1, T2, T3]. It is only natural that by reason of the third or fourth hand hearsay available to this witness, glaring inaccuracies appear in this testimony, even contradictions in the answers among the interrogatories and cross-interrogatories. All of the testimony demonstrates that the idea as to dates of the witness of appellee is wholly untenable. Mr. Lang's application was received on May 28th, processed; tax paid June 11th, and exportation thereafter made. Appellant's applications were received, without statement of any export ban, on May 27, 1946. The Peron Government acceded to power June 4th. It is reasonable to suppose, even if we had not the clear, definite testimony of Mr. Lang, that this new government put in by the "shirtless ones" would revise the cost of living after and not before it came to power.

A delay for any such temporary purpose as indicated by the witness of appellee in no respect operates to destroy a contract but merely suspends its operation for the duration of the embargo, depending upon the circumstances of the particular case and the pleadings thereof, various opinions in other jurisdiction may be found. It is, however, firmly established in California that, unless otherwise provided in

the contract, such temporary governmental suspension leaves the contract intact.

U. S. Trading Corp. v. Newmark, 56 Cal. App. 176-86, 205 Pac. 29.

This was a contract for the sale of 4000 tons of barley f.o.b. cars, California, with destination New Orleans. The Government Railroad Administration, in 1919, by embargo on use of cars, delayed the vendor in making delivery. The vendee claimed the failure on the part of the vendor to load the cars, when ordered, broke the contract.

"In embargoes such as this one was, the rule is that unless the parties have provided against it by their contract, they must submit to whatever inconvenience may arise therefrom. Congress in authorizing the establishment of such war-time regulations, did not intend to invalidate contracts of sale." (Cases cited.)

"Our conclusion that an embargo such as this one was merely suspends performance of the contract and does not dissolve it, and that the doctrine of commercial frustration is not applicable to the facts of this case, is supported by the most recent decisions upon the subject." (Cases cited.)

Graham, etc., Corp. v. Mt. View D. Corp., 37 Cal. App. 2d 315-21; 99 P. 2d 357;

Dorn v. Goetz, 85 Cal. App. 2d 407-16; 193 P. 2d 121.

A contract for the building of a house was involved. The building was delayed by enactment of the Veterans' Emergency Housing Act of 1946 which, in effect, limited residential construction to veterans' housing. Prevention by governmental regulation was claimed. The contract in issue was made February 16, 1946, and provided for com-

pletion July 1, 1946, with a 30-day leeway. The action was filed September 5, 1946. The Act provided for termination of its restrictions on December 31, 1947, and actually was repealed June 30, 1947. The Court, in its decision, reviewed the cases decided by California Courts on the doctrine of frustration and held that the burden of pleading and proof of harm by the alleged frustration lies upon he who claims harm thereby and approved the rule of *Newmark Grain* case.

Under the California rule, the burden of alleging and proving first, the unforeseeable risk of the governmental act and, second, that the value of performance is totally or nearly totally destroyed, is on him who asserts the issue.

Lloyd v. Murphy, 25 Cal. 2d 48-54; 153 P. 2d 47.

> "The doctrine of frustration has been limited to cases of extreme hardship so that businessmen, who must make their arrangements in advance can rely with certainty on their contracts (*Anglo-Northern Trading Co. v. Emlyn Junes and Williams*, 2 K. B. 78; 137 A.L.R. 1199, 1216-1221). The courts have required a promisor seeking to excuse himself from performance of his obligations to prove that the risk of the frustrating event was not reasonably foreseeable and that the value of counterperformance is totally or nearly totally destroyed, for frustration is no defense if it was foreseeable or controllable by the promisor, or if counterperformance remains valuable." (Cases cited.)

The evidence establishes that there was, in fact, no frustration, no prohibition of export, and no prohibition, at the time of application, for the issuance of export permits. At the best, there was a temporary suspension from June 16th to August 16th for the issuance of new licenses,

during a period of study. The McCormick line steamer sailed June 9th, without arrangement by appellee for freight space for the 50 ton June shipment. The pleadings and proof of appellee were wholly insufficient to raise the issue for which they now contend. The evidence clearly upholds and sustains the findings of the Court that appellant was, at all times, ready, willing and able to perform its contract. The decision of the Court, in this respect, is clear and in accordance with the law and the testimony [R. 61]:

> "The showing is that, under Argentine law and the custom obtaining, payment of the license does not have to accompany the application, that no notice of action on the application is given unless there is a rejection, and that, in the absence of such rejection, the exporter can pick up the license at any subsequent time when he is ready to export by tendering the fee. There is also evidence in the record that other exporters actually exported glucose during this period. So the upshot of the matter is this: Regardless of any order of cessation of exportation of glucose, the fact remains that glucose was actually exported and that an application for a license to export the glucose involved here was actually received by the proper governmental agency, and not rejected. More, as the alleged order merely suspended for a limited period, its effect, even if proved, would only be to delay performance. Such delay would not destroy the validity of the contract on the ground of frustration. (See, *Patch v. Solar Corporation,* 1945, 7 Cir., 149 F. 2d 558.)"

Conclusion.

Clear and simple are the real issues presented and found by the trial Court. It determined, grounded upon ample evidence, that a contract of sale was effected between the parties and evidenced by the requisite memorandum. Necessarily, this determination excludes and makes irrelevant the cavilings of appellee. The determination includes the Whipple Agency, the finality of the contract found, the meeting of the minds of the parties, and the inclusion in the memorandum of all essential terms. The trial Court determined, grounded on ample evidence, that appellant was, at all times ready, willing and able to ship the contract glucose. This determination included, necessarily, a finding that only the breach of appellee in failing to furnish shipping in Buenos Aires Harbor, ready to take the glucose, prevented performance. The great weight given to the findings of the trial Court, even when based upon conflicting evidence, always must be borne in mind. The extensive examination of the findings called into question may be subject to criticism, in view of the weight to be given thereto. This examination has, however, demonstrated that on the Findings here involved the eminent trial Court gave the only tenable determination.

Respectfully submitted,

STANTON & STANTON,
Attorneys for Appellant.

MESIROV & LEONARDS,
Of Counsel.

APPENDIX I.

Exhibit A.

[Title of Court and Cause.]

Affidavit on Admission Under Rule 36.

State of California, County of Los Angeles—ss.

Louis B. Stanton, being first duly sworn, deposes and says: That affiant is now and at all times since the inception of the above entitled case has been one of counsel of record for plaintiff in said action, and makes this affidavit for and on behalf of said plaintiff, and that the matters and things stated herein are all made upon the information and belief of affiant derived from various letters, correspondence and consultations.

That affiant has been informed by Argentine counsel that the Colacionado is a form of legal notice which is peculiar to the laws and the customs among merchants of the Argentine Republic. There seems to be no corresponding notice under Anglo-Saxon law.

That G. Fred Berger, president of the plaintiff corporation, returned to Buenos Aires on or about the 25th day of September, 1946, from his trip to the United States; that said trip to the United States and the occasion therefor is more fully set forth in the deposition of G. Ralph Heymsfeld, filed upon the trial of the above entitled action; that upon said return, said G. Fred Berger had consultation with Mr. Dittisheim, and thereupon and on or about the 27th day of September, 1946, employed

one Dr. Medrano, an attorney duly licensed to practice in the Republic of Argentina; that said employment was made for the purpose of negotiating with the suppliers of glucose; that at the time of said employment, said G. Fred Berger briefly discussed the situation with said Dr. Medrano.

That on or about the 30th day of September, 1946, Dr. Medrano composed the Colacionado, caused it to be typed and sent; that said G. Fred Berger did not see the document before it was sent; that said Colacionado contained many errors due to insufficient information on the part of said Dr. Medrano, but said errors were unimportant for the purposes for which the Colacionado was sent.

That the said errors contained in said Colacionado were manifest to the addressee.

That the errors contained in this Colacionado, together with other errors made by said Dr. Medrano, required said G. Fred Berger to relieve said Dr. Medrano of his employment shortly thereafter.

That affiant positively avers that his first information from Dr. Bunge Guerrico, counsel in Buenos Aires, as to efforts to exclude this telegram, was in a letter from said counsel dated October 4, 1948, which arrived approximately October 11, 1948; that on October 19, 1948, affiant mailed instructions to Dr. Bunge Guerrico suggesting the following procedure: That the formal objection to the introduction of the telegram be made on the ground that it was not called for under the direct interrogatories, as well as upon the ground of inadmissibility under the Ar-

gentine law, and have said objections certified as part of the record so that the whole may be sent to our Federal Court in Los Angeles for determination; that any and all demands to a court in Argentina be and cease and the whole be referred to the Federal Court in Los Angeles for final determination.

Further affiant saith not.

Louis B. Stanton.

Subscribed and sworn to before me this 26th day of October, 1948.

(Seal) John L. Welbourn.
Notary Public in and for said County and State.

APPENDIX II.

Exhibit B.

COLACIONADO

REPUBLIC ARGENTINA TELEGRAFO DO LA NACION

03 05

A Sifar
Reconquista 379
Buenos Aires

Procedencia	N.	F		Indicaciones
Buenos Aires	2023	175	17.15	Colacionado-Urbano

For	T	AF	Hoba Recepcion	Fecha
Garcia .c	Copiado		18.25	30 Sep. 1946

Confirming conversation regarding glucose contracted with you: Due to the fact that export permits were not granted after last May, by resolution of paramount Government of the Nation, hindering us in the fulfillment of sales in North America during four months, now our patrons having in fact quit their purchases and this venture having no means to continue, facing the obligations contracted with you up to a time when there is sold actual supply of glucose which we have taken and acquired by contracts expiring on September first, we aver that it is impossible for us to receive further additional deliveries. In consequence, we propose to charge to our account the expenses of storage and interest on the value of the merchandise which remain under your control up to the time it can be sold. Furthermore, we authorize you to sell the same for our account at a price up to five centavos lower than our cost; likewise, we propose a meeting together with all of our suppliers who are in the same position, to determine in a common agreement the manner of protecting our mutual interests. Let this be legal notice.

Engraw Comercial e Industrial S.A.

APPENDIX III.

"Important—The terms and conditions embodied on the front and reverse sides of this order shall constitute the sole and entire contract of purchase of the articles described herein and shall not be binding upon the buyer unless signed by our director of purchases or such authorized person as has been designated in writing by our director of purchases to the vendor."

Reverse Side Section 7 [R. 947].

"By acceptance of this purchase order, the vendor expressly warrants that all materials to be furnished hereunder, will be delivered in conformity to and in compliance with all applicable orders and regulations of the War Production Board, and will be invoiced at prices which conform to and comply with regulation, or any amendment thereof, of the Office of Price Administration, as expressed and set forth in any price schedule, Maximum Price Regulation, or the General Maximum Price Regulation whichever shall be applicable."